BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities.	Rulemaking 00-02-004

COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON COMMISSIONERS PEEVEY AND KENNEDY'S PROPOSED DECISION ON TELECOMMUNICATIONS CONSUMER BILL OF RIGHTS

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I. INTRODUCTION

In accordance with Rule 77 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure and the schedule set forth in the Notice of Availability issued on December 22, 2005, the Division of Ratepayer Advocates (DRA) submits these comments on Commissioners Peevey and Kennedy's Proposed Decision (PD) on the Telecommunications Consumer Bill of Rights. In sum, DRA supports the PD's initiatives on consumer education, enhanced enforcement and in-language support. However, DRA opposes the PD's elimination of General Order (GO) 168 consumer protection rules. In order for consumers to adequately protect themselves and to make sound decisions about telecommunications products and services, they must be equipped with both strong consumer protection rules and consumer education. Accordingly, DRA recommends that the Commission modify the PD to re-instate GO 168 in its entirety.

II. DISCUSSION

California ratepayers look to this Commission to adopt telecommunications policies that provide real consumer choice and enact strong regulations that protect them from fraud and abuses by carriers in the marketplace. The Legislature expressly declared that one of its policies for telecommunications for California is "to encourage fair treatment of consumers through provision of sufficient information for making informed choices, establishment of reasonable service quality standards, and establishment of processes for equitable resolution of billing and service problems."[1] While the PD adopts a number of consumer rights and launches a new consumer education program, both of which will assist consumers in making informed choices, the PD is still deficient because it does not contain substantive rules that would protect those rights. As stated by DRA in our previously-filed pleadings, rights without the corresponding rules are not enforceable

[1] Public Utilities Code § 709 (h)

and do not create any private right of action.[2] That is, although a customer can claim a "right" to certain fair treatment by the carrier, the customer is, nevertheless, left without a legal means to require or force the carrier to cease its unfair or inappropriate behavior against the customer. The right without the rule does not provide the aggrieved customer with a means of redress for harm caused to the customer by the carrier. Accordingly, without strong consumer protection rules, consumers are left only with the affirmative right of exercise of choice of another carrier. This is not consumer protection, this is caveat emptor.

A. Relying On Competition Alone To Protect Consumers Is Detrimental Reliance.

The PD posits that technology and market change undercut the need for consumer protection rules proposed five years ago, that "…[t]he telecommunications industry has become more and more competitive, and intermodal competition increasingly blurs the line between regulated and deregulated providers and services."[3] With the recent SBC/AT&T, Verizon/MCI and Sprint/Nextel mergers, both the wireline and wireless markets have become less competitive and customers will now have fewer choices for a provider.

The consultants for the wireless carriers, while touting the competitiveness of the industry, admit that there are only five major carriers who control 85% of the U.S. market. As California learned from recent history, such a small number of companies in control of an entire market can game the system and forego fair and competitive conduct. Over reliance on market competition to protect consumers can be dangerous. Regulators' experiences with both the telecommunications industry and the energy industry confirm that reliance on competition to protect the public can have disastrous results for consumers.

[2] The PD at p. 14 expressly states that: "These revisions make it clear that this statement of rights and principles is merely a statement of legislative intent – and should not be construed as set of independently enforceable rights."

[3] PD, pp. 3-4.

National Association of State Utility Consumer Advocates (NASUCA) has asserted to the Federal Communications Commission (FCC) that competition among wireless and long-distance carriers has not been sufficient to protect consumers. Their brief noted that:

> "As the [Federal Communications] Commission rightly noted in its 1999 Order in the TIB [Truth in Billing] docket, competition will not cure the plague of line item charges complained of in this petition . . . Competition rewards efficient carriers and punishes inefficient carriers but only if consumers can tell which carriers offer better service at lower rates. Perversely, without government regulation, inefficient carriers can hide their inefficiencies in line item charges while maintaining and advertising monthly and usage rates that are as low as, or even lower than their competitors. Only with great difficulty can consumers ascertain the true cost of their service. As a result, inefficient carriers are not punished by the competitive market, consumers are stymied in their efforts to shop between carriers based on accurate information about the true cost of telecommunications services and carriers are able to inflate their bottom-lines and blame it on the government."[4]

The FCC also refuted the claim that competition makes rules unnecessary as follows:

> "As competition evolves, the provision of clear and truthful bills is paramount to efficient operation of the marketplace . . . [S]ome providers in a competitive market may engage in misconduct in ways that are not easily rectified through voluntary actions by the industry. It is critical for consumers to receive accurate billing information from their carriers to take full advantage of the benefits of the competitive marketplace." [5]

[4] See Comments of the Attorney General and Office of Ratepayer Advocates, filed May 20, 2004, p. 5. citing National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Monthly Line Items and Surcharges Imposed by Telecommunications carriers, In the Matter of Truth in Billing and CC Docket No. 98-170 Billing Format, filed March 30, 2004, p. 10.

[5] In the Matter of Truth-in-Billing and Billing Format, Second Report and Order, Declaratory Ruling an Second Further Notice of Proposed Rulemaking (FCC TIB Second Report and Order), CC Docket No. 98-170, CG Docket No. 04-208, FCC 05-55, adopted March 15, 2005, ¶¶ 17-18.

Moreover, it is a dubious proposition for the Commission to put its faith solely on market competition, and even if the telecommunications market has some semblance has competition, consumer protection rules are still necessary in order to defend against carriers' market-driven incentive to acquire customers by whatever method that works.

For example, it is not as easy as the wireless carriers allege for customers who are dissatisfied with their wireless service to simply switch to another carrier. Many carriers require customers to lock into long-term contracts in order to obtain attractive service offerings. These long-term contracts require customers to pay high termination fees if customers terminate the contract and switch their service to another carrier before the term of the contract is up. Because the early termination fees are substantial, they greatly discourage and prevent customers from switching to another carrier even if they have problems with their existing provider. Thus, even if there are choices of providers, there are a number of conditions tied to their services which make it very difficult for customers to make use of their choices whenever they wish.

While wireless technology has benefited consumers in a number of ways such as lower prices, simplified rate plan structures, network coverage and capacity enhancements, none of these benefits argues against rules requiring comparable pre-sale disclosures for better-informed choice or a rescission period that provides the customer sufficient time to see the first bill before deciding whether to continue service. Most of these benefits are related to the service offering, not the marketing and advertising (disclosure) or providing proper follow-through, i.e., giving the customer the service plan he or she ordered. Thus, the PD, by eliminating GO 168 rules, has removed important protections to consumers on disclosure and rescission.

B. The Price Of Stand-Alone DSL Must Be Comparable Or Identical To The Price Of The DSL Piece Of The Bundled Local Service And Broadband Product.

The PD states that the stand-alone principle is to provide consumers the "right to purchase commercially available broadband service even if they do not obtain traditional voice service from their broadband provider."[6] DRA agrees with the PD that the wireline carriers that provide DSL service should be required to offer stand-alone DSL service. However, the PD's stand-alone DSL condition is incomplete: the PD does not address the question of the price that carriers may charge for stand-alone DSL service. For example, SBC currently offers basic VoIP-capable DSL service for $14.95 per month, in addition to basic charges. However, under the PD, SBC could comply with the stand-alone DSL condition by offering a "naked" DSL product for $40 per month (i.e., a price equal to the combined price of 1FR and DSL when purchased together). This would defeat the purpose of this condition. Thus, the PD should require that stand-alone DSL service be offered at a price that is comparable to, if not the same as, the DSL piece of the bundled local service and broadband product.

C. Consumer Rights

1. The PD's Privacy Right Should Not Be Limited to Financial Records and Personal Information.

The privacy right in the PD has been modified to include personal information in addition to financial records from prohibition against unauthorized use by carriers. While DRA supports the expansion of this right to include personal information, DRA opposes limiting the records to only "financial" records. The PD rejects DRA and other consumer groups' recommendation to eliminate the word "financial" on the grounds that "[a] blanket prohibition on carriers' use of consumer records, as urged by the consumer organizations, inhibits the development of pro-consumer programs by the carriers."[7] Contrary to the PD, DRA does not advocate for a blanket prohibition against the use of customer records by carriers. Rather, as stated in the disclosure right, DRA only opposes the "unauthorized use" of customer records and customer records should include "all" records, not just financial. DRA's recommendation is also consistent with PU Code § 2891 because this statute not only includes financial information, but also includes a

[6] PD, p. 27.

[7] PD, p. 18.

customer's calling patterns and service offering purchases. Accordingly, DRA continues to recommend that the PD eliminate the word "financial" from the privacy right as follows:

> "Privacy
>
> Consumers have a right to personal privacy, to have protection from unauthorized use of their ~~financial~~ records and personal information, and to reject intrusive communications and technologies."[8]

2. The PD's Public Participation And Enforcement Rights Unduly Hinder Public Participation In General Public Policy Proceedings.

The public participation and enforcement right adopted in the PD still places an unnecessary limitation on participation by the public in general public policy proceedings. As stated in DRA's previously-filed pleadings, the PD which adopts Commissioner Kennedy's May 2nd proposal without any modification, imposes an unnecessary limitation that could be interpreted to prevent the public from participating in public policy proceedings before the Commission. Under the current proposal in the PD, consumers must show a direct link to their rights in order to participate in general policy-making proceedings. The PD, while noting that the Commission has no intention of limiting public participation, nevertheless rejects DRA's recommendation on the basis that certain proceedings are restricted to interested parties or persons according to the Commission's Rules of Practice and Procedures and statutes.[9] DRA recognizes that, in certain Commission proceedings such as complaint proceedings, Rule 53 of the Commission's rules requires that "petitions to intervene and become a party thereto shall be in writing, shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought." However, removal of the words "affecting their

[8] PD, p A-4.

[9] PD, p. 19.

rights" from the above consumer right as recommended by DRA would not limit or alter the Commission's existing rules on public participation such as Rule 53 or make it inconsistent. Accordingly, the words "affecting their rights" should be removed from the proposed right so that the public is not unduly hindered from participating in general public policy proceedings as follows:

> "Public Participation and Enforcement
>
> Consumers have a right to participate in public policy proceedings ~~affecting their rights~~, to be informed of their rights and what agencies enforce those rights, and to have effective recourse if their rights are violated."[10]

D. Existing Laws And Regulations Do Not Adequately Protect Consumers, Especially Wireless Customers.

The PD states that consumers already have plenty of protections afforded to them under generally applicable laws and industry specific regulations.[11] The PD is incorrect for a number of reasons. First, many of the existing laws and regulations do not extend to wireless carriers. They apply primarily to wireline service because most of these laws and regulations were adopted before wireless service became available to consumers.

A review of the existing statutes and Commission decisions listed in the PD's Appendix D reveals that ILECs, CLECs and NDIECs are subject to a number of Commission decisions that prescribe detailed consumer protections. Among these protections are optional 900/976 service and Caller ID blocking, providing new customers within 10 days of initiating service a confirmation of services ordered and charges, in-language of sale, along with all material terms and conditions affecting what the customer pays for services, preventing denial of service or credit solely for customer's refusal to provide a Social Security Number, describing the lowest-priced service option available for the requested services, and maintaining toll-free numbers for service and information calls.

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[10] PD, p. A-4.

[11] PD, p. 31.

Conspicuously lacking in the Appendix D list of existing consumer protections, however, is any set of rules that would require wireless carriers to provide protections to consumers similar to those required of other carrier types. Strangely, competition is assumed to provide protections to wireless customers that it has not provided to customers of other carrier types. However, the only provision in the list of existing protections that applies specifically to wireless carriers is PU Code § 2892, which requires wireless carriers to provide 911 service.[12]

According to the July 2005 FCC Report on Local Competition, there were 23.5 million wireless subscribers in California as of the end of 2004."[13] According to a joint consumer groups' filing before the FCC in the Truth-in-Billing docket, "the total number of wireless subscribers now [2005] actually exceeds the total number of wireline subscribers."[14] Some of these subscribers are now using their wireless handsets as their only voice connection link to their family, friends, work and emergency services. Under the PD as currently drafted, these cell phone users would not be adequately protected from abuses by their service providers.

Second, since many of the existing laws and regulations do not apply to wireless carriers, relying on them would also result in unreasonable discrimination between wireline and wireless customers and create consumer confusion about their rights. This failure to apply consumer protections to all carriers equally is contrary to the Commission's principle of competitive neutrality. Fairness dictates that the Commission require both the wireline and wireless carriers to comply with a universally imposed set of general consumer protection rules. This is also essential so that there is consistent

[12] The PD includes the wireless carrier 911 rule also despite its acknowledgment that competition will give carriers the incentive to implement 911 services on their own. This is an example of the selective and inconsistent logic used to justify preconceived goals.

[13] Ex. 1, Testimony of Mark Lowenstein, p. 5.

[14] Initial Comments of AARP, Asian Law Caucus, Consumer Union, Disability Rights Advocates, National Association of State PIRGS and National Consumer Law Center, filed June 24, 2005 in CC Docket No. 98-170, CC Docket No. 04-208, In the Matter of Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, p.2.

protection for all consumers, regardless of what type of telecommunications services or provider they choose.

Third, existing statutes are also broadly stated and leave too much discretion to carriers to provide the details they wish to disclose to consumers. For example, an existing disclosure statute found in Public Utilities (PU) Code § 2896(a) states:

> "The [C]ommission shall require telephone corporation to provide customer service to telecommunication customers that includes, but is not limited to, all the following: (a) Sufficient information upon which to make informed choices among telecommunications services and providers. This includes, but is not limited to, information regarding the provider's identity, service options, pricing, and terms and conditions of service. A provider need only provide information to its customers on the services which it offers."

The words "sufficient information" and "information regarding" are too vague and ambiguous. Consequently, in GO 168, the Commission clarified these terms by enumerating the types of information that would be required. It did not state each and every detail that must be disclosed by carriers, but provided examples of rates, terms and conditions that would suffice at a minimum. Thus, even though there is an existing statute on disclosure as found in PU Code § 2896, it is too ambiguous and vague resulting in carriers being able to determine how these terms should be satisfied and thus, contributing to significant customer confusion and dissatisfaction with their telephone carriers. Many other existing statutes likewise suffer from the same inadequacies, and hence do not protect consumers sufficiently.[15]

Lastly, GO 168 includes new consumer protections of which there are no similar protections in the current laws or regulations. For example, Rule 2(d) is a new rule which requires carriers to disclose key rates, terms and conditions of service. Carriers argue that customers have a number of choices for both the telecommunications service providers and service offerings. If customers, however, are unable to effectively compare between

[15] PU Code § 2890 regarding Non-Communications Related Charges; PU Code § 779.5 regarding deposits.

providers and service offerings, there is no meaningful consumer choice. In order to compare competitors' offerings, customers need to have the same set of information on the service offerings from the service providers. Rule 2(d), by requiring carriers to disclose key rates, terms and conditions in a clear and conspicuous manner, allows consumers to make such a comparison. This is one example of a new rule which would allow consumers to comparison shop and make informed choices for services and providers because it requires all carriers, whether wireless or wireline, to disclose the same basic set of key, qualifying information to the consumers.

E. Consumer Harm From Imposing Rules Is Unsubstantiated

The PD concludes that GO 168 rules will harm consumers because many carriers are likely to pass their implementation costs onto consumers.[16] Such a conclusion, however, is not supported by the record. Although carriers have made a number of assertions that implementing GO 168 would be costly and time-consuming, there is no cost data in the record that support these assertions. No carrier submitted any reliable cost data in this proceeding.

The PD goes on to state that "with respect to the ten-point font proposal, requiring companies to move from 9.5-point font to ten-point alone could cost them millions of dollars while adding little readability." Here, the PD again reaches a conclusion that is purely speculative. The PD rejects the ten-point rule on the assumption that implementing such a rule could impose additional costs on carriers, but without any reliable cost data to support it. To the contrary, the record demonstrates that 5- or 6-point type in certain disclosures is more the order of the day.[17] The record also shows that carriers already comply in large measure with disclosure rules.[18] The carrier witnesses showed that the carrier's disclosure practices follow the original GO 168 requirements in

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[16] PD, p. 50.

[17] Ex. 7, Opening Testimony of Lynn Maack, Attachment A.

[18] Ex. 5, Marni Walden, Verizon Wireless; Ex. 17, Kelly King, Cingular Wireless; Ex. 18, David Conn, Omnipoint Communications, Inc., dba T-Mobile.

most, if not all respects.[19] DRA notes the PD's own logic in justifying applying its three proposed rules to carriers, "If carriers already follow this practice, then the requirement imposes no incremental cost on carriers."[20] Accordingly, if there is no incremental cost to carriers, then any benefit to consumers from a rule should provide justification for implementing the rule. The logic is equally applicable to applying specific disclosure rules also.

The PD's conclusion on consumer harm is also without merit because the conclusion is reached without taking into consideration the cost implications of un-doing all of the implementation work that many of the carriers have already done. As we stated in our previously-filed pleadings, the majority of carriers did not seek time extensions to comply with the consumer protection rules. This has been made clear from pleadings filed in this proceeding by carriers as well as from the compliance summary document prepared by the Telecommunications Division (TD).[21] According to TD, as of December 6, 2004, 177 companies submitted a certificate with TD stating that they were complying fully or in part with GO 168.[22] More notably, 130 companies or approximately 73% of all companies indicated that they had fully complied with D. 04-05-057 as of December 6, 2004. With respect to the specific rules, no carrier asked for extension of time to comply with rules 13 and 15. Likewise, no carrier requested time extension for Part 4, rules governing billing for non-communications-related charges and Part 5, rules governing slamming complaints. Moreover, if implementing GO 168 rules is costly, un-doing the implementation work that has already been done may well be just as costly. Since the PD has eliminated virtually all of GO 168 rules, many carriers would now have

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[19] See testimonies of Marni Walden, Verizon Wireless; David R. Conn, T-Mobile; Kelly King, Cingular Wireless)

[20] PD, p. 55.

[21] On March 11, 2005, Commissioner Grueneich held an all-party meeting in this proceeding. At that meeting, TD distributed a document titled "Telecommunications Bill of Rights Compliance and 48b Extension Request Status" which set forth data on carrier compliance.

[22] Many of these companies hold several carrier licenses, or authorities, due to mergers and acquisitions.

to incur additional costs to un-do the implementation, which would likely be passed onto consumers as well.

F. Consumer Complaint Data

1. The PD Is Dismissive Of Consumer Complaint Data.

The PD asserts that DRA's complaint sample was inadequately selected and inappropriately small.[23] As to selection, the PD erroneously concludes that selection was based on "preconceived notions of which categories would be most likely to contain disclosure complaints." Other than speculation raising this idea,[24] there is nothing in the record to show that complaints were selected in a biased manner. Sixteen categories of complaints were reviewed, with no knowledge beforehand of the contents of those categories.[25] As to sample size, the 16 categories DRA sampled comprised nearly 80% of the wireless carrier complaints in 2004.[26] Of those, 25% were reviewed. Accordingly, it is difficult to understand how the sample size is insufficient as asserted in the PD. Rather, as is evident from the nearly 80% sample, even if selection had been based on "preconceived notions," there was little remaining from which to select for review. Moreover, the "preconceived notion" idea is untrue, would have no practical effect if true, and is without merit.

In discounting the sample size and the relative volume of disclosure-related complaints, the PD also ignores the "tip of the iceberg" theory, rendering Consumer Affairs Branch's (CAB) complaints merely "anecdotal" in the end. The PD asserts that

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[23] PD, p. 38.

[24] Reply Testimony of Schulte and Johnson, p. 4

[25] The categories "Misc/Misc" and "Service/Misc" in Table 5 of Mr. Maack's Opening Testimony should bear this out—the former contained no disclosure-related complaints out of 71, and the latter contained only 1 out of 73—including these categories was certainly not helpful to DRA's case.

[26] Ex.1, Maack Opening Testimony, p. 3 and Table 5; sample of 7,651 from 9,829 total wireless complaints

complaints in the CAB category "abusive marketing" were minimal,[27] arguing against imposing rules covering marketing and advertising. However, the "abusive marketing" category CAB uses is not related to "advertising" as such. It is used to record instances of abusive carrier conduct, such as misleading statements inducing customers to buy a service, inaccurate descriptions of rates, terms or conditions, bills not matching the service ordered, and even snappy, pushy or unhelpful consumer service representatives.

Although the "abusive marketing" complaints were relatively few, the instances of misrepresentations and inadequate disclosures in that sub-category were the highest (on average, 57%) of all categories and sub-categories reviewed.[28] Furthermore, the "abusive marketing" complaints were not the only complaints about inadequate or misleading disclosures; they were merely the easiest to find, obviously due to the subcategory title. As the PD acknowledges, DRA's survey also found instances of misrepresentations and inadequate information in nearly every other category and subcategory reviewed. Usually, those complaints were contained as part of other complaints having to do with "billing" or "service," which were considered the primary complaint subjects. However, this fact does not nullify the occurrences of inadequate disclosure, or the relevance of the analysis.

2. The PD Imposes A Test For Consumer Complaints That Is Unreasonable.

Accepting carrier testimony that DRA did not "validate" complaints as to whether grievances were "actual" grievances or "document what information a customer actually received, as compared to what the consumer reported when making a complaint,"[29] the PD sets up a test for complaints so rigorous that no reasonable analysis would be sufficient to show consumer harm. The PD's test would require retrieving all documents provided (or, worse yet, NOT provided) to each complainant in order to "validate" each

[27] PD, p. 35.

[28] Ex. 7, Maack Opening Testimony, Table 5.

[29] PD, p. 38.

complaint about inadequate disclosure. To insert such a requirement into statistical complaint analysis is to dismiss consumers' complaints out of hand. For the Commission to take that stance is a slap in the face of the consumers it is supposed to protect. As DRA pointed out in the evidentiary hearing, the complaints resolved in favor of complainants outnumbered those decided in favor of carriers by three to one.[30] That track record provides independent validation of the consumer complaints DRA analyzed.

Carriers in their pleadings have suggested that sometimes people forget or misunderstand things they were told. However, anecdotal or speculative references to customers "forgetting" they were told something are inadequate to discredit DRA's findings. In any event, clearer written disclosures would mitigate forgetting or misunderstanding. Rules requiring display of key rates, terms and conditions, highlighted for impact, would help accomplish the goal of clear disclosure and provide effective memory aids.

The PD also asserts that it is impossible to tell from DRA's analysis of billing complaints how many complaints pertain to various types of subject matter. Two of those matters are, "how many were requests for explanation of bill formats and descriptions …; and how many were simply requests for help in getting in touch with a carrier to discuss a bill."[31] DRA addressed these questions in its testimony at hearing. Mr. Maack stated that 90 percent of telecommunications carrier complaints were classified as "complaints," eight percent as "inquiries" and two percent unclassified.[32] The two matters mentioned above are informational and would fall into the "inquiry" classification whereas 90 percent of the CAB records can be considered "substantive." As for the wireless carrier complaints DRA identified with disclosure-related issues, Mr. Maack pointed out that 98 percent were "complaints."[33]

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[30] RT Vol. 14, p. 1372.

[31] PD, p. 37.

[32] RT Vol. 14 p. 1372

[33] Id.

3. Wireless Carrier Complaints Have Increased.

The PD claims that there is no baseline for assessing the importance of current complaint statistics.[34] However, DRA's Opening testimony showed a five-year history of complaints.[35] Wireless carrier complaints increased by 63% from 2003 to 2004 and increased another seven percent in the first six months of 2005.[36] Citing the FCC's 2005 Report on Local Competition, witness Lowenstein offered that there were 23.5 million wireless subscribers in California at the end of 2004. According to that same report, there were 20.4 million subscribers at the end of 2003.[37] From these numbers, it is apparent that wireless carrier subscribership increased during 2004 by 15%. Obviously, the increase in complaints far outstripped the growth in customer subscribership.

Carriers will likely claim that complaint rate should be based on minutes of usage. That might be appropriate if one is measuring service quality, but that is not at issue in this proceeding. When considering consumer protection measures, such as disclosure, marketing practices, service initiation and changes, deposits, and the other rules at issue in this proceeding, which are not based on units of service usage, the number of subscribers is the appropriate measure for complaint rate calculations..

4. The PD Improperly Rejects Imposition Of Consumer Protection Rules.

The PD rejects imposition of new rules because, "[w]ithout data on the scope of the inappropriate behavior, one cannot make such an assessment of benefits and costs. Without such an assessment, it is not prudent to adopt sweeping new rules."[38] The PD, however, fails to point out that the May 2nd Assigned Commissioner's Ruling prevented consumer groups from obtaining data on the scope of inappropriate behavior by prohibiting discovery of carriers' own complaint information. The evidentiary phase in

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[34] PD, p. 36.

[35] Ex. 7, Opening Testimony of Lynn Maack, p. 3.

[36] Ex. 19, Reply Testimony of Lynn Maack, p. 5.

[37] FCC Report on Local Competition, July 2005, Table 13.

this proceeding thus favored carriers, the opponents of new rules, by precluding meaningful analysis that may have gone against them. No adequate evaluation was able to be made by the consumer groups because the assigned Commissioner's ruling specifically excluded the very data that was necessary to perform such an evaluation.

5. Complaints At The Commission Are Not The Only Indicator Of Need For Consumer Protection Rules.

While the PD discusses the CAB data and surveys, it does not appear to have considered other information that is publicly available. Reports and studies continue to support the statements made by law enforcement agencies and consumer groups showing that strong consumer protection rules applicable to all telecommunications carriers are needed. For example, a recent survey of 21,944 cellular phone users conducted by Consumers Union in six large cities including Los Angeles and San Francisco found that "the overall satisfaction with the [cellular] companies. . . is lower than for most other businesses and services we rate such as auto insurers or hotel chains."[39] The study also found that 30% of these respondents had called a cellular company because of a question or complaint with billing. Eleven percent of respondents reported persistent billing problems in the past year such as overcharges or mistakes. A significant number of respondents also had service quality problems. In the week before the survey alone, 10% of the respondents said they could not get service; 14% of the respondents said they experienced dropped calls; and 11% of the respondents said their calls were marred by severe static or difficulty hearing the other party clearly. Finally, more than one-third of survey respondents had seriously considered switching their cellular provider, but did not do so because they did not want to get a new phone or because they faced a large early termination fee.[40]

(continued from previous page)

[38] PD, p. 47.

[39] Consumers Union, *Three Steps to Better Cellular,* Consumer Reports, Vol. 68, No. 2 (Feb., 2003) pp. 15-18.

[40] Id.

Additionally, California Better Business Bureau (BBB) statistics for 2004 showed that the wireless industry generated approximately 28,000 customer complaints, more than any other industry. The wireline telephone companies also made the list of the BBB's ten most-complained of industries.[41] Consumer Reports similarly found that consumers' satisfaction with cellular service was lower than other businesses they rated such as auto insurers or hotel chains.[42]

6. Consumer Surveys Also Face Unreasonable Tests.

The PD reaches illogical conclusions about other state and national consumer surveys and errs in rejecting them as inapplicable to the California market. The PD concludes that the AARP surveys are not reliable and are not representative of California consumers because they are not California surveys and because they do not breakdown the number of California users. Even though the surveys are not California-specific, they are relevant and useful. California has one of largest subscribership of telephone users and it is one of the largest states in the nation. Many wireless carriers who operate in California also claim that they operate in other states as well as nationally. Hence, surveys such as AARP are relevant to California and it is reasonable to conclude that these surveys include consumers that are similarly situated to California consumers in terms of carrier service.

The PD also inappropriately separates wireless from wireline when analyzing the validity of consumer surveys. Wireless carriers tout wireless industry penetration rates,[43] asserting that wireless access lines now equal or exceed wireline subscriptions. The PD states that by 2004, the number of wireless access lines in the United States exceeded the

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[41] RT Vol. 14, p. 1269.

[42] See Reply Comments of the Office of Ratepayer Advocates filed September 4, 2003; *Three Steps to Better Cellular,* Consumer reports, February 2003; See also National Regulatory Research Institute, Consumer Utility Benchmark Survey: A Comparison of Consumer Contacts with Utility and Telecommunications Industries, June, 2003 <nrri.org>.

[43] Ex. 1, Testimony of Mark Lowenstein, p. 5.

number of wireline connections.[44] If that is the case, it is wholly reasonable to conclude that broad surveys of telecommunications consumers such as AARP and California telephone survey contain significant proportions of wireless customers.

G. Rules On Non-Communications Related Charges Should Not Be Repealed.

The PD's repeal of the rules on Non-Communications related billing charges (Non-Com rules) is also not supported by the record in this proceeding. The PD concludes that the "opt-in" and the "PIN" requirements would be extremely burdensome for both carriers and customers. However, the record does not contain any relevant evidence which supports that implementing the PIN code would necessarily be burdensome for carriers or that requiring customers to use it would be extremely inconvenient. Rather, the PD's conclusion relies on irrelevant and anectodal evidence from Japan where customers can wave their wireless handsets over turnstiles to board mass transit trains.[45] Based on this anecdotal evidence, the PD concludes that the PIN requirement is not warranted. However, the record is devoid of information as to whether other security mechanisms may be in place in Japan. Without this information, the Commission jeopardizes consumers by removing all Non-Com security requirements from the consumer protection rules.

The PD also states that a "unique electronic identifier associated with each wireless handset is as effective as a PIN and assures that charges can only be incurred by someone in physical possession of the handset."[46] While DRA agrees that charges can only be incurred by someone in physical possession of the handset, the more critical point is that the "unique electronic identifier" only determines whose account the charge is billed to. It does not prevent an unauthorized person from charging a product or service to someone else's telephone bill. Simply waving a handset over a sensor is convenient,

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[44] PD, p. 4.

[45] PD, p. 61.

[46] PD, p. 62.

but neither the sensor nor the handset determines who is doing the waving. Thus, an electronic identifier is not as secure or effective as a PIN.

In addition, the PD points out that the PIN requirement is unnecessary because no such requirement is placed on credit card users.[47] The PD is wrong. Although credit card users may not have to place a PIN code before authorizing credit cards, there is an "equally secure mechanism" requirement placed upon credit card users. For example, before one can make a purchase using a credit card, whether over the telephone or via Internet, the purchaser must engage in a process, usually much more time-consuming than pushing four digits of a PIN code. Typically, the customer must speak with a live person or interact with a computer display and provide key identification information, such as name, credit card number, credit card authentication number and expiration date. This information serves the same function as the PIN code because it requires the credit card user to submit verification information before the purchase can be made. The PD supports this scenario where it cites an example of a customer purchasing a song downloaded to a computer via a DSL line: ". . . the extensive information provided to establish a Web connection could obviate the need for the consumer to enter a pin." This statement, however, does not argue against a rule requiring a PIN or another equally secure mechanism. Rather, it shows that the download scenario easily satisfies the Non-Com rule by providing an equally secure mechanism. And, of course, a signature is required when a credit card purchase is made in person. This security mechanism is at least as "burdensome" as entering a PIN, if not more.

Additionally, the credit card industry has other protections for their customers that do not currently exist for Non-Com customers. For example, credit card companies often waive charges that were not authorized by their customers simply on their oral representation. It is unclear, however, whether Non-Com customers would be afforded similar protection for Non-Com charges that were erroneously or fraudulently placed by someone else on their handsets. A recent, well-publicized case of a customer whose

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[47] Id.

wireless handset was stolen and who incurred subsequent billing of more than $26,000 for fraudulent calls is instructive. When the customer complained, the carrier suggested that the customer file bankruptcy if unable to pay. The customer spent frustrating hours on the phone with the carrier trying to resolve the problem to no avail. The carrier instituted a collection action affecting the customer's credit rating and refused to forgive the calls until the news media, a state legislator and public pressure forced proper review and resolution of the situation.[48] In view of problems such as this, rather than compound the problem by eliminating security protections for Non-Com purchases, the Commission should retain the affirmative measures it previously adopted in GO 168.

The PD also minimizes the potential risk of Non-Com abuses. The PD assumes that customers will use their handsets primarily to make small Non-Com related purchases. Such an assumption is unsupported. Nothing in the record supports that the use of handsets will be limited to small purchases. PU Code § 2890 likewise does not limit Non-Com charges to small purchases.

Lastly, the PD ends its discussion on Non-Com billing rules by concluding that the Commission will monitor the use of phone bills for Non-Com charges and, if a pattern of abuse warrants, impose rules. While monitoring the phone usage of Non-Com charges is useful, the Commission should not wait until after the damage has been done to enact meaningful consumer protection on Non-Com charges. As with slamming cases, by the time enforcement actions are brought against bad actors, the damage to customers has already been done. Enforcement actions are also very costly and take years to resolve. Accordingly, the Commission should not wait, but instead take pro-active measures by adopting new rules, such as the "opt-in" and the "PIN code" authorizations to prevent abuses from occurring in the first place.

[48] http://cbs5.com/30minutes/local_story_259184928.html, October 24, 2005.

H. Consumer Education Must Be Coupled With Enforceable Rights.

The PD eliminates the existing consumer rights protections and replaces them with consumer education and outreach. DRA agrees that consumer education and outreach are important. However, they are not sufficient to adequately protect consumers. Education, without the necessary consumer protection rules, would not have the desired effect of preventing marketing abuses through informed customer choices. Unless the consumer can utilize his or her education by taking the necessary steps to enforce a right by way of a rule that he or she has been "educated" about, a carrier would have no incentive to cease inappropriate behavior. Also, without the rules, neither the Commission nor other enforcement agencies would have the authority to prevent the behavior. Accordingly, DRA agrees with Commissioner Brown that, "It is far more effective to put prescriptive rules to the people that sell to the market".[49]

Consumer education also has other limitations as stated in our briefs. It is unpredictable in its reach and effect and consumers have no incentive to learn unless they are ready to buy the service offerings. When customers purchase the service offerings, the carriers are in the best position to educate through their marketing efforts. However, unless those marketing efforts are clear, honest and complete, even they will not have the desired effect. The PD states that "In a telecommunications market where technological change and new service offerings are occurring daily, education may offer a quicker and more robust way to protect customers than the adoption of regulatory rules that constrain service offerings by imposing a one-size-fits-all model on a complex industry using many different business models."[50] However, it is inconceivable that the Commission can be expected to keep up with industry's daily service plan changes. This statement harkens back to the days when the Commission actually engaged in command-and-control regulation of telecommunications utilities and required carriers to file their service offers

[49] RT Vol. 14, p. 1343.

[50] PD, p. 64.

with the Commission for review and approval. This is no longer the case. In the current environment, where service plans change frequently, the only effective consumer protection/education is specific rules requiring basic disclosure parameters. Carriers are the first to know their new service offerings, hence they are best positioned to inform consumers about those service offerings.

Additionally, consumer education is not without cost. The cost of the Telecommunications Education Trust program the wireline group refers to as a potential model was $58 Million.[51] The consumer education program conducted for electric restructuring cost nearly $90 Million over two years, with $73 Million expended in the first nine months.[52] This is not to say that consumer education efforts are not valuable, but the Commission must decide who will pay and for what and whether the cost and effectiveness of implementing specific disclosure rules outweighs the cost and effectiveness of public education programs.

DRA also believes that consumer education and outreach should be more aggressive than envisioned in the PD. The PD states "Consumer education is central to providing California residents with the tools they need to make informed decisions."[53] We agree with that principle but believe that the PD's education approach will not do this, especially concerning wireless services, because it fails to address important questions consumers would have in making purchasing decisions. In order for customers to receive the information necessary to make informed decisions, the Commission should also provide information in print and on its website to aid customers in choosing between carriers. This information should explain the key differences in plans offered by wireless providers, including information about the lengths of contracts and early termination fees. Furthermore, the Commission should provide information to aid customers when customers believe they must take legal or administrative action against carriers. We

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[51] D.97-03-069, 71 CPUC 2nd, p. 459.

[52] D.99-08-024, p. 10.

[53] PD, p. 64.

believe that the Public Advisor's office would be the logical Commission entity to provide education and outreach to consumers since it already provides procedural information and advice to individuals and groups who want to participate in formal PUC proceedings. Moreover, while DRA supports a consumer education program, we oppose replacing GO 168 rules with consumer education. What is required is a combination of consumer protection rules *and* consumer education.

I. Effective Enforcement Is Not Possible Without Consumer Protection Rules.

The PD adopts new enforcement measures such as Special Telecommunications Consumer Fraud Units within the Consumer Protection and Safety Division (CPSD), the expansion of the Commission's toll-free hotline and the updating of CAB's complaint database system to better aid consumers in resolving disputes and to take actions against carriers for violations of laws and regulations.[54] While these new enforcement initiatives may enhance the Commission's existing enforcement mechanisms, these initiatives would not be effective if there are no adequate consumer protection rules, particularly against wireless carriers, that the Commission can enforce and consequently, there would be no effective remedy for consumers whose rights have been violated by carriers. The Attorney General and the local District Attorneys would likewise be severely hindered in their ability to prosecute carriers that engage in anti-competitive and unscrupulous conducts if there are no adequate consumer protection rules on the books. Accordingly, similar to consumer education, enforcement measures must be combined with consumer protection rules in order for the Commission and other enforcement agencies to protect consumers from fraud and abuse by carriers.

III. CONCLUSION

For all of the foregoing reasons, DRA supports the PD's consumer education and enforcement initiatives, but opposes the PD's elimination of GO 168 consumer protection

[54] PD, pp. 77-81.

rules. The telecommunications consumer bill of rights must include consumer rights, consumer rules that enforce those rights and consumer education.

Respectfully submitted,

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January 17, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON COMMSSIONERS PEEVEY AND KENNEDY'S PROPOSED DECISION ON TELECOMMUNICATIONS CONSUMER BILL OF RIGHTS in R.00-02-004** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

[X] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on January 17, 2006 at San Francisco, California.

/s/ ALBERT HILL

Albert Hill

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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